

**THE UNITED REPUBLIC OF TANZANIA**  
**IN THE HIGH COURT OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF DODOMA**  
**AT DODOMA**

**MATRIMONIAL APPEAL NO. 13 OF 2020**

*(From Matrimonial Appeal No. 06 of 2020 at Singida District Court in  
Singida. Original matrimonial cause No.26/2020,  
at Utemi Primary Court at Singida)*

**GODFERY EDWARD KESI.....APPELLANT**

**VERSUS**

**MARY PHILIPO..... RESPONDENT**

*Date of last Order: 09/06/2022*

*Date of Judgment: 24/8/2022*

***JUDGMENT***

**Mambi, J.**

The appellant (**GODFERY EDWARD KESI**) in this appeal that relates to Matrimonial Cause was dissatisfied by both decisions and orders of the District and Primary Courts. Initially the primary court made the decision in favour of the respondent (Mary) and made an order of divorce of the marriage. The Primary Court declared that the marriage between the

parties was irreparably broken down. The Trial Primary Court further made an order of division of the matrimonial assets. With regard to the children, the primary court ordered the custody of two children who were under seven years old to be under their mother (the respondent). The appellant appealed to the District Court but the District Court upheld the decision of the Primary Court.

Aggrieved by the decision of the District Court, the appellant has now appealed to this court against the decision of the District Court on the following grounds;

- 1. That, the Appellate District Court erred in law and fact, by ordering divorce without any proper reasons and evidence thereof.*
- 2. That, the Appellate District Court erred in law and fact, by ordering the Decision of Matrimonial properties while there is no marriage approved before Primary Court between the parties.*
- 3. That, the Appellate District Court erred in law and in fact, by ordering the custody of children to the respondent while she is incapable of taking care of the welfare of the children as she is staying with the step father and her income is questionable.*
- 4. That, the Appellate District Court erred in law and in fact, by ordering the division of matrimonial property without considering that some of it does not belong to the parties and*

*some of them she never contributed for anything.*

During hearing, both parties appeared unrepresented and each party prayed to rely on their documents they filled.

I have carefully gone through the submissions from both parties including the records such as proceedings, judgment and other records. In my considered view this appeal forms almost three issues that are interrelated as follows:

- (i) Whether the District Court erred in making its decision by upholding the decision of the trial court.
- (ii) Whether the order on division of matrimonial assets and other orders made by trial court were proper or justifiable

Having considerably gone through the grounds of appeal and reply by both parties including the records from the both the lower courts, I will answer the issues I have raised. I wish to first address and determine as to whether the existence marriage was proved at the primary court. My perusal from the trial court reveals that the existence of marriage between the parties was proved. There is no doubt both parties were married and were blessed with children and the appellant admitted that the children belongs to him that is why he was claiming for custody of those children. Indeed the appellant in his first ground of appeal also appears to have admitted that there was marriage when he said that the divorce was ordered without reasons and evidence. On top of that the appellant in his

third ground of appeal also papers to be aware of the marriage and they were blessed with children when he said that the respondent is incapable of taking care of children. The appellant in his fourth ground also seems to be admitting that there were properties that relate to matrimonial assets and other properties are not part of the matrimonial assets as the respondent never contributed. In my view the existence of matrimonial assets means there was marriage otherwise there can be no matrimonial properties without the existence of marriage.

In this regard the claim by the appellant in his grounds of appeal, the claim by the appellant that the marriage was not proved has no merit

Having addressed the first issue, I will now collectively address two issues namely whether the trial magistrate erred in equally distributing the matrimonial properties to the parties and whether the trial magistrate used properly the provisions of the Law of Marriage Act in ordering the distribution of the matrimonial properties. This brings me in determining as to whether the matrimonial assets were distributed in accordance with the law. I have gone through the judgment of the primary court and noted that the Trial court was right in its decision. Indeed the records show that the appellant got more properties than the respondent. I wish to refer and quote pages 3 and 4 of the judgment of the primary court. In those pages the trial court ordered the properties to be divided as follows:

*"Kwa sababu hizo tunasema ndoa kati yao imevunjika na hafai kurekebishwa tena mdai apewe talaka yake mara moja.*

*Kuhusu watoto wanaendelea kuishi na baba yao kwani siku zote wanaishi naye tangu mdai alivyowaacha".*

*"Kuhusu mali za pamoja tunasema kama ifuatavyo:-*

- 1. Nyumba wanayoishi ya mwaja achukue mdaiwa*
- 2. Nyumba ambavyo haina madirisha wala malango achukue mdai.*
- 3. Nyumba yenye frame za biashara achukue mdaiwa.*
- 4. Viwanaja sita, nane vikao Mwaja kimoja Mwankoko. Kiwanja cha Mwankoko achukue mdai na mdaiwa achukue nane vya mwaja.*
- 5. Shamba hekari tatu (3) lipo mwankoko mdai achukue hekari moja na mdaiwa hekari mbili.*
- 6. Vyombo vya ndani wagawane sawa".*

Looking on the way the trial primary court dealt with the division of the matrimonial properties, it is clear that the primary court made its decision basing on evidence of both parties.

The evidence from the records is clear that both parties had some contribution on the properties. In this regard the lower court properly made its decision basing on the extent of the contributions made by each party. I wish to refer the relevant provision of the law that is Section 114 (2) (b) of the Law of Marriage Act, Cap 29 [R.E. 2019] as follows:

*"(2) In exercising the power conferred by subsection (1), the court shall have regard-*

*(a) ....*

*(b) to **the extent of the contributions** made by each party in money, property or work towards the acquiring of the assets”*

Reading between the lines on the above paragraph of the Section, it is clear that before ordering the division of the matrimonial assets the court must foresee the extent of the contributions made by each party in money, property or work towards the acquiring of the assets”. The word “**Shall**” under the Law of Interpretation Act, Cap. 1 [R.E. 2019] implies mandatory and not optional. I thus uphold the decision of the Primary court on the division of matrimonial properties.

The records from the lower courts reveal that the appellant has failed to prove if there was no marriage and if the respondent had no contribution on the matrimonial properties. This simply means that he who alleges must prove as indicated under section 112 of the Evidence Act, Cap 6 [R.E2019], which provides that:

*"The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by law that the proof of that fact shall lie on any other person”.*

The court in **NATIONAL BANK OF COMMERCE LTD Vs DESIREE & YVONNE TANZAIA & 4 OTHERS, Comm. CASE NO 59 OF 2003( ) HC DSM**, observed that:-

*"The burden of proof in a suit proceeding lies on their person who would fail if no evidence at all were given on either side”.*



I am of the settled view that the trial court properly used its powers on division of the matrimonial properties. Reference can be made to section 114 (2) (b) of the Law of Marriage Act, Cap 29 [R.E. 2019] which provides that:

*"(1) The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their **joint efforts** or to order the sale of any such asset and the division between the parties of the proceeds of sale.*

*(2) In exercising the power conferred by subsection (1), the court shall have regard– (a) to the customs of the community to which the parties belong;*  
*(b) to the **extent of the contributions** made by each party in money, property or work towards the acquiring of the assets;*  
*(c) to any debts owing by either party which were contracted for their joint benefit; and (d) to the needs of the infant children, if any, of the marriage",*

The above provision is very clear that any court dealing with matrimonial cause is empowered to grant a decree of separation or divorce and order the division between the parties of any assets acquired by them during the marriage by their joint efforts if there is evidence to prove **contribution** of each party. Reference can also be made to the decision of the court in

**SAMWEL MOYO Vs. MARY CASSIAN KAYOMBO [1999] TLR 197,**  
where it was held that:

*"...its apparent that the assets envisaged **there at must firstly be matrimonial assets, secondly must have been acquired by them during the marriage and thirdly they must have been acquired by their joint efforts. The three conditions must exist before Court's power to divide matrimonial or family assets under s.114 (1) of the Law of Marriage Act is involved...**"*

The law under Section 114(2) (b) goes further by requiring the court in exercising its power under the law to have regard to **the extent of the contributions** made by each party in money, property or work towards the acquiring of the assets. I am of the settled view that the trial court did properly exercise its power conferred under Section 114(2) (b) of the Law of Marriage Act.

There is also no dispute that the respondent who had legal marriage with the appellant were blessed with some children has some contribution on the acquisition of the matrimonial assets but that should not plainly mean that she contributed fifty percent without prove. However, as I alluded I am of the settled view that the trial court properly made its decision which was also upheld by the District Court.

Worth also referring the decision of the court in **GABRIEL NIMRODI KURWIJILA Vs THERESIA HASSAN MALONGO, Civil Appeal No 102 of 2018** (Unreported) where it was held that;



*"...The extent of contribution is of utmost importance to be determined when the court is faced with a predicament of division of matrimonial property. In resolving the issue of extent of contribution, the court will mostly rely on the evidence adduced by the parties to prove the extent of contribution..."*

Regarding the status of marriage between the spouses, I have no reason to fault the decision reached by the trial court that the marriage was irreparably broken down and both the orders of the Primary court and District Court are upheld.

With regard to the status of the children in which the District court ordered the appellant to handle them to the respondent, I differ with this decision and uphold the decision of the primary court which ordered the two children to be under the care of the appellant. In my view since the children have attained the age of seven years and since they have been staying with the appellant without any problem, I find it proper the children to continue staying with the appellant. However, the respondent shall have access to her children at any time. The appellant should not put any barrier to the children to access their mother at any time. In this regard the third ground of appeal on the custody of the children has merit and is allowed. On the other hand the first, second and fourth grounds of appeal are unmerited as I reasoned above.

For the foregoing reasons, it is my considered firm view that all the matrimonial properties listed above will be distributed or divided basing on the order make by both lower courts. In the final event this appeal is partly

allowed to the extent of the orders I have made. Given the circumstance of this case, I make no orders to costs.



**A. J. MAMBI**

**JUDGE**

**24/08/2022**

Judgment delivered in Chambers this 24<sup>th</sup> day of August, 2022 in presence of both parties.



**A. J. MAMBI**

**JUDGE**

**24/08/2022**

Right of Appeal Explained.



**A. J. MAMBI**

**JUDGE**

**24/08/2022**